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In the Supreme Court of the United States

OCTOBER TERM, 1927.

No. 131.

ANDREW W. MELLON (SUBSTITUTED FOR JAMES C. DAVIS), DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, PETITIONER,

vs.

EDWARD GOODYEAR (SUBSTITUTED FOR LOUISA GOODYEAR), AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED, RESPONDENT.

BRIEF FOR THE PETITIONER.

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KELLEY BRIEF PTG. CO. TOPEKA

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vs.

EDWARD GOODYEAR (SUBSTITUTED FOR LOUISA GOODYEAR), AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED, RESPONDENT.

BRIEF FOR THE PETITIONER.

1. This case is here on a writ of certiorari to the Supreme Court of the State of Kansas, the writ having been granted November 23, 1926, (Mellon, Director General of Railroads, Petitioner, v. Goodyear, Administrator, Respondent, 47 S. Ct. 240). The decision to be reviewed is reported in Goodyear v. Davis (Mellon substituted), 121 Kan. 392; 247 Pac. 446, decided July 10, 1926. (R. 109.) This decision refers to and approves a former decision of the same case, Goodyear, Admx., v. Davis, Director General of Railroads, 114 Kan. 557, 220 Pac. 282; 115 Kan. 20, 220 Pac. 1049.

2. The specific claims advanced and rulings made which are relied upon as the basis of this court's jurisdiction are as follows:

Petitioner insisted as a matter of law that under the

Federal Employers' Liability Act a settlement made in good faith during the lifetime of an employee after an injury and prior to his death, was a bar to an action by a personal representative for the benefit of dependents for the death if it resulted from the injury. (R. 13, 21, 45, 46, 47, 52, 53, 107.)

The Kansas Supreme Court, in its opinion on this appeal Goodyear v. Davis (petitioner substituted), 121 Kan. 392, 393; 247 Pac. 446 (R. 111, 112), held:

> "The Federal Employers' Liability Act (35 U. S. Stat., ch. 149, as amended by 36 U. S. Stat., ch. 143) creates a right of action in the injured employee for his suffering and loss resulting from the injury and also creates a distinct and independent right of action in the personal representative of the deceased employee in the event death results from the injury, for the benefit of certain designated dependents."
>
> "A settlement made by the injured employee after the injury and prior to his death, for his suffering and loss, is not a bar to the action by the personal representative for the benefit of dependents for the death, if it resulted from the injury."

It is of this construction of the Federal Employers' Liability Act that your petitioner complains.

Petitioner also claims that the trial court and the Supreme Court of Kansas placed an erroneous construction upon the Federal Employers' Liability Act by the giving and approval of the following instruction, No. 8, at the trial of said cause (R. 27, 45-47, 52, 111):

> "You are instructed that the Federal Employers' Liability Act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained

of by the plaintiff in this case; one right of action to the injured employee for his suffering and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death results from the injury. *And you are instructed that the latter cause of action could not be released by the deceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part.*" (Italics ours.)

3. The jurisdiction of this court is invoked in this cause under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, and under sub-section (a), Section 5, Rule 35 of Revised Rules, effective July 1, 1925.

All questions herein arise under a Federal Statute—the Federal Employers' Liability Act—and involve a direct construction thereof, being ch. 149, 35 Stat., 65; ch. 143, 36 Stat., 291 (Appendix A), and present questions of law under the undisputed facts. This Court has held that such questions are Federal questions of law, of which this Court has jurisdiction, and in numerous cases involving similar questions such jurisdiction has been taken.

4. The jurisdiction of this Court is sustained by the following cases:

Chesapeake, etc., R. Co. v. Nixon, 46 S. Ct. 495.
Chicago, etc., R. Co. v. Coogan, 46 S. Ct. 564.

STATEMENT OF THE CASE.

This action was brought in the State court by a personal representative against the Director General of Railroads for damages under the Federal Employers' Liability Act of April 22, 1908, and 1910 Amendment thereto, ch. 149, 35 Stat. 65; ch. 143, 36 Stat. 291 (Appendix A). Plaintiff's intestate, Lewis Goodyear, 65 years of age, with a life expectancy of about 11 years (R. 10), was employed by the Director General of Railroads at Belleville, Kansas, as a car inspector, earning approximately $160 per month. Goodyear was injured on July 31, 1919, while on the station platform waiting to inspect an incoming interstate train, by reason of being struck by a baggage truck which stood on the platform, did not clear the approaching train and was hurled against Goodyear. His injuries consisted of two fractured ribs and some bruises on the head, body and knee. He made a full and complete settlement with the Director General of Railroads on March 16, 1920, nearly eight months after the accident, for the sum of $1,135 and payment of doctor bills, and a complete release was executed by Goodyear for all damages growing out of the accident. (R. 13.) On May 4, 1920, nearly two month after the settlement, Goodyear died. His widow, Louisa Goodyear, was appointed administratrix and brought suit in behalf of herself and one daughter aged 17 years, as dependents, and another daughter aged 22 years, as a partial dependent upon the deceased, the petition alleging that Goodyear's death resulted from

the injuries sustained July 31, 1919, on account of the negligence of the Director General of Railroads. (R. 2, 9.)

The petition demanded $12,000 as damages—first, $7,000 for the injuries sustained by Goodyear, medical attention and impairment of earning power; second, $5,000 for pecuniary loss to the dependents. (R. 10.) An answer was filed consisting of a general denial with plea of contributory negligence, assumption of risk and a plea setting up the settlement and release as a bar to the action. (R. 11.) A reply was filed, which admitted the signing of the release and receipt of the sum of $1,135, but sought to avoid the release by alleging that the release was obtained by fraud, or that Goodyear was mentally incapable of executing it, or on account of mutual mistake as to the extent of his injuries, and in any event that there was a cause of action which remained in the beneficiaries and which could not be settled by Goodyear (R. 15-19)

This case was tried twice. The first trial was in May, 1922, resulting in a verdict and judgment in favor of the defendant, the Director General of Railroads, with special findings of the jury in favor of the defendant. (R. 53-56.) Instructions were given at the first trial to the effect that if the release was fairly entered into by Goodyear, without fraud or mistake or mental incapacity, as alleged, the release was a complete bar to an action by the administratrix, and this, we contend, is the law as laid down by this Court and by the Federal courts in construing the Federal Employer's Liability Act. However, the first judgment in defendant's favor

was reversed by the Kansas Supreme Court in Goodyear v. Davis, 114 Kan. 557; 220 Pac. 282; 115 Kan. 20, 220 Pac. 1049, under a novel construction of the Federal Employers' Liability Act, to the effect that a settlement made by an injured employee prior to his death was not a bar to an action by a personal representative for the benefit of dependents for the death, if it resulted from the injury, and holding that there was a separate and distinct right of action that remained in existence until the injured employee died, which could not be released during the lifetime of the injured employee. (R. 53-56.)

As there was no final judgment against petitioner's predecessor at the first trial of the case, no application for certiorari could be made to this Court. Bruce v. Tobin, 245 U. S. 18; 38 S. Ct. 7; Williams v. Southern Pacific Co., 258 U. S. 622; 42 S. Ct. 315. Therefore it became necessary to go through another trial.

At the second trial of the case, in November, 1924, the jury returned a general verdict for plaintiff for $5,000, and at the same time made special findings: 1, that the defendant was guilty of no fraud in making the settlement with Goodyear on March 12 and 16, 1920; 2, that Goodyear was mentally capable of transacting business on those dates; 3, that there was no mutual mistake, past or present, as to Goodyear's physical condition prior to and at the time the settlement was agreed upon and completed; 4, that the release was not given under a mistaken belief of Goodyear and a representative of the defendant that the material results of the injuries of

July 31, 1919, had disappeared. (R. 43.) Notwithstanding these special findings of the jury, which, under the law as applied by the Kansas Supreme Court, governed the general verdict and should have precluded the rendering of any judgment in favor of the plaintiff, and notwithstanding a motion was filed by the Director General for judgment upon the findings (R. 45, 46), the trial court entered judgment for $5,000 upon the general verdict. (R. 48.)

It is contended that the general verdict on the second trial was a finding by the jury that Goodyear died as a result of the injuries, but it ought to be entitled to no greater sanctity in this respect than the first verdict, which was to the contrary.

The trial court also gave instructions, which were approved by the Kansas Supreme Court in its opinion, and which virtually compelled the rendition of the verdict and judgment. Instruction No. 8 given by the trial court was as follows (R. 27):

> "You are instructed that the Federal Employers' Liability Act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained of by the plaintiff in this case; one right of action to the injured employee for his suffering and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death resulted from the injury. *And you are instructed that the latter cause of action could not be released by the deceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear*

in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part." (Italics ours.)

This instruction was approved by the Kansas Supreme Court in its opinion upon appeal from the second trial, and your petitioner respectfully insists that such action of the Kansas Supreme Court is an erroneous construction of the Federal Employers' Liability Act, in conflict with the decisions of this Court and of the Federal courts in construing said act. Such a construction invites litigation, permits double recoveries when the act itself says that there shall be but one recovery, impairs the obligation of contracts of settlement, prevents the settlement of disputes and is against public policy, which demands that there shall be an end to litigation.

On February 13, 1926, the petitioner was substituted as judgment debtor herein (R. 108) and on September 2, 1926, the respondent was substituted as judgment creditor herein on account of the death of the original plaintiff. (R. 116.)

The question of the proper construction of the Federal Employers' Liability Act was raised throughout the trial by requested instructions as to the binding effect of the release, motions for judgment in behalf of the defendant, Director General of Railroads, on the findings of the jury, notwithstanding the general verdict, and because no right of action existed in a personal representative, for the reason that the same had been extinguished by the settlement made by Goolyear during his lifetime and a complete release executed for all

damages, and these questions were urged both in the trial court and in the Supreme Court of Kansas. (R. 21, 45, 46, 52.) The Supreme Court of Kansas filed its opinion and order of judgment sustaining the lower court and final judgment of affirmance was entered in the Supreme Court on July 10, 1926. (R. 108-113.)

While this Court has not passed directly upon this question, we contend that it has passed upon it inferentially, and that the holding of the Kansas Supreme Court is contrary to the decisions of this Court in Michigan Central R. Co. v. Vreeland, 227 U. S. 59; 33 S. Ct. 192, and St. Louis, etc., R. Co. v. Craft, 237 U. S. 648, 35 S. Ct. 704. The decision of the Kansas Supreme Court is also directly contrary to the holding of the Federal Court of Appeals of the Third Circuit in Seaboard Air Line R. Co. v. Oliver, 261 Fed. 1. It is also contrary to the overwhelming weight of judicial authority and if upheld by this Court will make settlements impossible in serious personal injury cases arising under the Federal Employers' Liability Act, thus affecting vitally the management of 250,000 miles of railroad in the United States, as well as several hundred thousand railroad employees, any of whom might receive injuries in interstate commerce and be desirous of making settlement without litigation.

ASSIGNMENTS OF ERROR.

The Supreme Court of Kansas erred:

1. In refusing to direct the trial court to render judgment in favor of the appellant (your petitioner substituted) upon the special findings of fact made and returned by the jury, notwithstanding the general verdict, as requested by the defendant.

2. In approving the giving by the trial court of instruction No. 8, as follows:

> "You are instructed that the Federal Employers' Liability Act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained of by the plaintiff in this case; one right of action to the injured employee for his suffering and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death results from the injury. And you are instructed that the latter cause of action could not be released by the deceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part."

3. In permitting a recovery under the Federal Employers' Liability Act, notwithstanding a complete settlement was made in good faith with the injured employee during his lifetime, thus tending to impair the obligation of the contract of settlement entered into between Goodyear and your petitioner's predecessor, contrary to

the provisions of Section 10, Article I, of the Constitution of the United States and contrary to public policy favoring the compromise and settlement of disputes.

4. In permitting a double recovery, to wit, a recovery by Goodyear during his lifetime by virtue of a settlement entered into by him, of which he and his beneficiaries received the benefit, and then permitting a second recovery by the personal representative for the beneficiaries after his death, when the Federal act itself provides in section 9 thereof, that "there shall be only one recovery for the same injury."

5. In entering judgment affirming the District Court of Republic County, Kansas.

ARGUMENT.

I.

UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, SETTLEMENT AND RELEASE OF ALL CLAIMS FOR PERSONAL INJURIES MADE IN GOOD FAITH BY AN INJURED EMPLOYEE, WHO SUBSEQUENTLY DIES AS A RESULT OF THE INJURY CONSTITUTE A BAR TO AN ACTION BY A PERSONAL REPRESENTATIVE FOR THE BENEFIT OF DEPENDENTS FOR THE DEATH.

All of the assignments of error will be presented together, because the findings of the jury show conclusively that there was a valid settlement and release by Goodyear during his lifetime, which extinguished any possible cause of action which a personal representative otherwise might have had, if the rights of action created by the injury had remained in existence until the time of the death. Petitioner insists that the release executed by the injured employee for all damages was a complete bar to an action for further recovery by a personal representative for subsequent death. *The issue thus narrowed, is whether under the Federal Employers' Liability Act, a settlement made in good faith with an injured employee during his lifetime for injuries received in interstate commerce, is a bar to an action for further recovery by a personal representative for the benefit of dependents for the subsequent death, if it results from the injury.*

As preliminary to this issue, it is proper to say that from the earliest history of Kansas, it has been the law of the State that—

"When the special finding of facts is inconsistent with the general verdict, the former controls the latter and the court may give judgment accordingly." Section 288, chapter 26, page 171, Compiled Laws of Kansas, 1862.

This identical statute is in effect today, Sec. 60-2918, R. S. 1923.

In Garath v. Board of County Comrs., 63 Kan. 755, it is said:

"When the special findings of the jury and general verdict cannot be reconciled the special findings should be treated as the verdict and the court should render judgment thereon."

In Tacha v. Chicago, etc., Ry. Co., 97 Kan. 571, 572, the Supreme Court of Kansas said:

"Probably a written motion for judgment on findings is not essential. When inconsistent with the general verdict they control and it is the duty of the court with or without formal application to give judgment accordingly.

The special findings acquit the defendant of negligence. Section 294 of the civil code (Laws 1913, ch. 239) provides:

'When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.'

"So say all the decisions of this court for the last forty years, beginning with Nichols v. Weaver, 7 Kan. 373, decided in 1871, down to Martin v. City of Columbus, 96 Kan. 803, 153 Pac. 518, decided in 1915."

In Maris v. Railway & Light Co., 98 Kan. 205, paragraph 3 of the syllabus is as follows:

> "Where the special findings showing in detail just what occurred contradict and overturn the finding of negligence, they control, and it is proper in such case to set aside the verdict in plaintiff's favor and render judgment for defendant upon the findings."

The following cases hold to the same effect:

Hauck v. Mercantile Co., et al., 99 Kan. 790.
Kirk v. Stout, et al., 105 Kan. 54.
Wall v. Construction Company, 108 Kan. 531.
Hanabery, etc., vs. Erhardt, et al., 110 Kan. 715.
Roome v. Petroleum Co., 111 Kan. 633.
Hegarty v. National Refining Co., 112 Kan. 151.

It is apparent that the jury by upholding the release in the special findings, made no allowance for the damages claimed on behalf of Goodyear; that the verdict for $5,000 was solely for pecuniary loss to the dependents and was the result of instruction No. 8 set forth in Assignment of Error No. 2, to the effect that there was a right of action in favor of the personal representative, for the benefit of dependents which "could not be released by the deceased Lewis Goodyear by any action taken by him", over which he would have no control in his lifetime, and which did not accrue until his death.

In view of the findings of the jury in favor of the appellant, the Supreme Court of Kansas should have reversed the judgment entered on the general verdict and remanded the cause with direction to enter judgment for the appellant upon the special findings.

Instruction No. 8 was clearly erroneous as it is in conflict with the decision of this Court in Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, in which this Court said, on page 69 of the opinion:

> "The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act."

This Court then said, on page 70 of the opinion:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, Sec. 124; Louisville, E. & St. L. R. R. Co. v. Clark, 152 U. S. 230; Read v. G. E. Ry., L. R., 3 Q. B. 555; Hecht v. O. & M. Ry., 132 Indiana, 507; Fowlkes v. Nashville & Decatur R. R. Co., 9 Heisk, 829; Littlewood v. Mayor, 89 N. Y. 24; Southern Bell Tel. Co. v. Cassin, 111 Georgia 575."

This Court then said, on page 71 of the opinion:

> "The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."

It thus appears that the Federal Employers' Liability Act is a compensatory statute, not penal, and is sub-

ject to the same interpretation as that placed upon the Lord Campbell's Act statutes of the great majority of the States of the Union by the courts of such States.

The case of Hecht v. O. & M. Ry., 132 Indiana 507, 32 N. E. 302, cited in the Vreeland case at page 70, held that a recovery by the injured party in his lifetime would bar an action by his personal representatives after his death. At the conclusion of the opinion, the court said (32 N. E. 305):

> "In this case the injured party at the time of his death could not have maintained an action for the same act or omission had he lived; hence there is no right of action given to his personal representatives by the statute."

The case of Littlewood v. Mayor, 89 N. Y. 24, cited in the Vreeland case, held that a suit and judgment in the lifetime of an injured person barred a suit by his administrator after his death.

The case of Southern Bell Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881, cited in the Vreeland case, held that a release by the decedent in his lifetime barred an action to recover damages for his wrongful death. It is a most interesting case and goes fully into the reasons upon which the decision is based. It is one of the leading cases upon the construction of Lord Campbell's Act and analyzes the different decisions, both English and American, points out that in two or three instances where the minority rule is adopted the decisions are based upon penal statutes, and reaches the conclusion that there can be no recovery by dependents where

there had been a settlement with the decedent during his lifetime. The citing of this case in the Vreeland case indicates most strongly that this Court adopted the views expressed therein. Some expressions from the opinion in the Cassin case are as follows:

> "If a release wipes out the wrong done by the defendant, and makes it as though no injury had been suffered, then upon the death of the injured party there would be no cause of action, just as though there had been no injury; and it would not be a question as to the right to maintain two concurrent suits, but as to the right to maintain any suit at all." (36 S. E. 883.)

> "The various cases under different statutes are supported by different reasons, but as already stated, they generally agree in holding that there is a single remedy. Tiffany, in his work on Death by Wrongful Act (Section 124), after giving all the acts of the different States, and citing all the cases, including Lord Campbell's Act and decisions thereunder, lays the rule down as follows: 'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representative for his death. Thus, a release by the party injured of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action'." (36 S. E. 886.)

> "The Fitzgerald case logically leads to the conclusion that the widow is barred by the settlement. To hold otherwise would be to say that the wife could be barred by what her husband said, but not by what he did; that she might be concluded by words, but not by money; that the evidence of her husband, given in the suit for his personal injuries, might be used against her in a suit for his

death, but that the more solemn judgment against him would not conclude her. If the wife is in privity with her husband, it is conceded that his settlement will bind her; but, if there is no privity between them as to this class of cases, then, if the husband should sue and fail to recover, the wife, after his death, would not be bound by that judgment. She may bring suit and obtain a verdict notwithstanding the husband failed in his suit. *So that not only is a settlement no bar, but neither is a verdict against the husband a bar. This would not only make the statutes penal, but it would not allow the defendant to buy his peace by paying money; nor could he secure peace by making a successful defense immediately after the injury, when the recollection of the witness is fresh, when they are all accessible, and when the circumstances of the injury can be most certainly and truthfully portrayed. But as in this case, five years after the injury, upon proof, that can oftentimes be only too easily secured, that the old injury has been the cause of the recent death, the defendant is again called into court.* What is it to do? How is it to perpetuate its evidence? How is it to know whether the suit is ever to be brought or not? How is it to know whether it is liable or not? It has been acquitted of liability to the husband, but years after it is sought to make it liable to the wife. In many cases it would be perfectly easy for the wife to make out a *prima facie* case—rely, say, upon the presumptions against railroads—and recover against the defendant, who was not at fault, who has been adjudged not to be in fault, but whose witnesses may have died or moved away, or otherwise become inaccessible. These are not improbable results. They are certain to follow if the contention of the defendants in error is sound." (36 S. E. 887.)

"The settlement operates as a bar, upon considerations of a public policy encouraging compromises, which would be rendered difficult, if not impossible,

under the view contended for by defendants in error. The contention of the defendants in error means that, if a settlement takes place, the defendant may be called upon to pay a second time in case of death. *It means double damages. It means that the statute is to be treated as penal, and not compensatory. It means that we are to lay at the door of our statute the reproach which was so often and so justly uttered against the statutes of some of the other States, as to which it was said that it was actually 'cheaper to kill than to hurt'. With us, hereafter, it would mean the same thing, because for the death of the husband there would only be one recovery. For his injury and subsequent death, there could be two recoveries.* We have seen that statutes identical with ours in substance, having the same object in view, and intended to give the same rights, have all, or very nearly all, been construed to mean that where the husband was injured, and subsequently settled for the injury, and thereafter died from the effect of the injury, there could be no recovery by his wife for his death. . . . Not only would it be a hardship to require a defendant to pay double damages, but there are questions of public policy which cry out against such a construction—a public policy so pronounced that it would require every reasonable doubt to be resolved in its favor. If the defendant is to pay the injured man full damages, and subsequently is to pay the full value of his life, it becomes manifest that settlements are impossible. It would operate to deprive the injured party 'of the power of settling his claim or realizing anything from it in his lifetime. It would naturally, if not inevitably, prevent settlements and procrastinate litigation until it could be determined whether death would ensue from the injury. There could be little inducement to settle without suit, because whatever might be paid to the injured party would neither bar nor diminish the claim of his widow or children should death ensue'. . . .

Under such a construction the law, by its own act, would encourage litigation, in spite of the maxim that 'it is to the interest of the commonwealth that there should be an end of litigation'. It would make it impossible to obey the injunction, "Agree with thine adversary quickly whilst thou are in the way with him"; for the defendant can properly ask, 'Who is mine adversary?' He might be willing to settle, he may have agreed on terms, and yet he would be compelled to say to a husband and father: 'It is impossible to say whether you will die as a result of these injuries or not, or whether when you die your wife and your children will then be living or not, or whether you will be wifeless and childless.

"'She may consent to the settlement, but she may also die, and you may marry again. Or the wife may die and leave you children. It is impossible to settle with them, because they are minors, and, even if that were legally possible, there may be after-born children; and all of these uncertainties must be considered in our negotiations' *Surely the law does not intend that any case shall be so inchoate that the person liable does not know to whom he may be ultimately liable, and cannot adjust and settle, even when he admits liability and is willing to pay.*" (36 S. E. 889.) (Italics ours.)

By citing this case, on page 70 of the opinion in the Vreeland case, this Court undoubtedly intended that it should govern the construction to be placed upon the Federal Employers' Liability Act.

In Edwards v. Chemical Co., 170 N. C. 551, 87 S. E. 635, it was held that a judgment obtained and satisfied during the lifetime of an injured party was a bar to the maintenance of an action for damages on account

of the death resulting from such injuries. The court said:

"The question presented in the record has been much considered by the courts, and it has been very generally held—a position in which we fully concur—that the statute conferring a right of action for wrongfully causing the death of another, usually to be prosecuted by the personal representative, *does not, and was not intended to confer such right when the intestate, the injured party, had been compensated for the injury during his life and had received such compensation in full adjustment of his claim.* The legislation on the subject in this country is, to a large extent, modeled upon an English statute, commonly known as Lord Campbell's Act, St. 9 & 10 Vict. c. 93. Our own law (Revisal Secs. 59 and 60) being substantially a reproduction of the English statute, and the construction put upon the law in England was that the action would not lie if the injured party had, during his life, received satisfaction for the wrong; these courts being of opinion that it was the purpose and meaning of the statute to deprive the wrongdoer of the protection oftentimes afforded by reason of the common-law principle that actions of this character died with the person. Read vs. Great Eastern Ry., Law Reports, 3 C. Q. B. (1867-68) p. 555. In that action, it was shown that the injured party, deceased, had accepted a sum of money in full satisfaction for the wrong, and the plea in bar was held a good defense. Blackburn, Judge, delivering the principal opinion, said, in part:

"'Before that statute (Lord Campbell's Act) the person who received a personal injury and survived its consequences could bring an action and recover damages for the injury, but if he died from its effects, then no action could be brought. To meet this state of the law, the Act of St. 9 and 10 Vic. was passed,' etc.

"And Lush, Judge, concurring, said in part:

"'I am of the same opinion. The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, "Actio personalis moritur cum persona", would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer.'

"*This construction of the law has been very generally adopted by the courts of this country, whether the statutory action is considered a new right or a continuation of the old, and there is very little to be added to the cogent reasoning which they have presented in support of the position.* Littlewood vs. Mayor, 89 N. Y. 24, 42 Am. Rep. 271; Telephone Co. vs. Cassin, 111 Ga. 575, 36 S. E. 881; 50 L. R. A. 694; Thompson vs. Railway, 97 Tex. 590, 80 S. W. 990, 1 Ann. Cas. 231; Price vs. Railroad, 33 S. C. 556, 12 S. E. 413; 26 Am. St. Rep. 700; Hecht vs. Railway, 132 Ind. 507, 32 N. E. 302; Mooney vs. Chicago, 239 Ill. 414, 88 N. E. 194. *And cases in Supreme Court of the United States and text books of approved excellence recognize and approve the principle.* Michigan Cent. Ry. vs. Vreeland, 227 U. S. 59-70, 33 Sup. Ct. 192, 57 L. Ed. 417; Ann. Cas. 1914C, 176; Tiffany on Death by Wrongful Act (2d ed.), Sec. 124; 3 Elliott on Railways (2d ed.), Sec. 1376; 8 A. & E. Ency., p. 870; 13 Cyc., p. 325.

"In the citation to Tiffany, the author says:

"'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him in damages for the personal injury, this will operate equally as a bar in an action by his personal representative for his death. Thus, a release by the injured party of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action.'

"In Vreeland's case, Associate Justice Lurton, delivering the opinion, said:

"'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent, immediately before his death to have maintained an action for his wrongful injury'." (Italics ours.)

In Louisville R. Co. v. Raymond's admr., 135 Ky. 738, 123 S. W. 281, the court held that it was error to sustain a demurrer to that part of the answer pleading a settlement for the reason that settlement or recovery by the decedent during his lifetime was a bar to an action by the personal representative for the death, citing the Hecht, Littlewood and Cassin cases, referred to in the Vreeland case, 227 U. S. 70. The court added: "The authorities on the subject are consistent and uniform. 13 Cyc. 325."

The Raymond case was followed in Perry's adm'r v. L. & N. R. Co., 199 Ky. 396, 251 S. W. 202, in which it was held:

"The personal representative acts for and on behalf of and in the stead of a deceased person only, and, if the deceased would have had no cause of action had she lived, none would pass to an administrator to recover damages for her death."

In State v. United Rys., 121 Md. 457, 88 Atl. 229, it was held that under a Lord Campbell's Act statute, where an injured person released the defendant from all claims on account of the injury during his lifetime, such release was a bar to a subsequent action for his

death resulting from the injury. The decision was based upon the same authorities as were quoted in the Vreeland case.

In Bruns v. Welte, 126 Ill. App. 541, it was held:

> "A release from liability for personal injuries given by the person injured bars the personal representative of such person from maintaining an action against the party claimed to have negligently caused the same where such injuries ultimately have resulted in death."

In Strode v. Transit Co., 197 Mo. 616, 95 S. W. 851, it was held that a settlement made with an injured person during his lifetime was a complete bar to an action for wrongful death, and, on page 856, the court said:

> "Whether the right of action is a transmitted right or an original right; whether it be created by a survival statute or by a statute creating an independent right, the general concensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts no further right of action existed."

The above was quoted with approval by the Kansas Supreme Court in Sewell v. Ry. Co., 78 Kan. 1, 14, 96 Pac. 1007.

Even in Pennsylvania, where there is a peculiar statute providing that no action for personal injuries by negligence or default shall abate at plaintiff's death, but shall survive to his personal representatives, and

that when an injured person did not sue during his lifetime his widow or personal representative may sue, it was held, in Hill v. Penn. Ry. Co., 178 Pa. 223, 35 Atl. 997, that where a settlement was made with the injured person and a release taken such release was binding. This was based upon the Read case, 3 Q. B. 555, cited in the Vreeland case.

It is not necessary to multiply these authorities. The general rule is stated in 17 Corpus Juris, 1246, as follows:

> "Whether the right of action is a transmitted right or an original right, and whether it is created by a survival statute or by a statute creating an independent right, the general consensus of opinion is that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased has received satisfaction in his lifetime, either by settlement and adjustment, or by adjudication in the courts, it is a good defense to the statutory action brought after his death."

Heretofore the Kansas decisions have been strongly in line with the majority rule, beginning with 18 Kan. 46, (1877) as is shown in the opinion of the Kansas Supreme Court on the first trial of this case (Goodyear v. Ry. Co., 114 Kan. 557, 567), where it is said:

> "In this state we have a statute providing an action for death by wrongful act by the personal representative (Gen. Stat. 1915, Sec. 7323). We also have a statute which provides for the survival of causes of action (Gen. Stat. 1915, Sec. 7322). Under these statutes it was held, in McCarthy, Adm'r. v. Railroad Co., 18 Kan. 46, that under our survival

> statute the only causes of action to survive for injury to the person is when the death does not result from the injury, but occurs from some other circumstance; that if the death was the result of the injury the action should be solely under section 7323. . . . The conclusion reached in that case has been uniformly adhered to by this court. City of Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113; Martin v. Railway Co., 58 Kan. 475, 49 Pac. 605; Railway Co. v. Bennett, 58 Kan. 499, 49 Pac. 606, disapproving contrary position taken in the same case by the Court of Appeals, 5 Kan. App. 231; Sewell v. Railway Co., 78 Kan. 1, 96 Pac. 1007; Berner v. Mercantile Co., 93 Kan. 769, 145 Pac. 567. The same conclusion was reached in Holton v. Daly, Adm'x., 106 Ill. 131, and Lubrano v. Atlantic Mills, 19 R. I. 129."

The uniform interpretation of such statutes as the Lord Campbell's Act, the distinguishing features of which this Court says are identical with the Federal Employers' Liability Act, was recognized by the Kansas Supreme Court in Berner v. Merc. Co., 93 Kan. 769, 770, where it is said:

> "By the great weight of authority an action can not be maintained under such a statute where the injured person in his lifetime had made a settlement and released his claim for the loss occasioned to him. Such is the law in this state. The conflict in the cases is noted, and the reasons for the rule stated, in Sewall v. Railway Co., 78 Kan. 1, 11-16, 96 Pac. 1007. See, also, note, 27 L. R. A., n. s., 176; note, 1 Ann. Cas. 232; 1 C. J. 526; Perry v. P., B. and W. R. R., 24 Del. 399, 77 Atl. 725; Mooney v. City of Chicago, 239 Ill. 414, 88 N. E. 194; Melitch v. United Rys. & E. Co., 121 Md. 457, 88 Atl. 229."

The Kansas Supreme Court also had occasion to consider the resemblance between the Federal Employers' Liability Act and the Lord Campbell's Act in Giersch v. A., T. & S. F. R. Co., 98 Kan. 452, 171 Pac. 591, 596, in which it said:

> "*It (Federal Act) has repeatedly been said to be similar to the Lord Campbell Act*, and in fixing the limitation at two years it is difficult to conceive that it was intended that all this time and more might elapse before an administrator must be appointed, and that he would then have two years longer in which to sue, which would be the case if the time ran from his appointment and not from the death of the decedent."

Since the decision of the case at bar, the Kansas Supreme Court has decided the case of Fuller, Admx., v. Atchison, T. & S. F. R. Co., 124 Kan. 66, 257 Pac. 971, (July 9, 1927) under the state Employers' Liability Act, (Appendix B) which was practically an adoption of the Federal act, and in that case reached the conclusion that the state liability act should be construed with the Lord Campbell's Act statute (Appendix C) and that the settlement and release were a bar to recovery, in line with its previous decisions. The headnotes are as follows:

> 1. "An employee of a railroad company was injured through negligence of the company, and died as the result of his injuries. His administratrix sued for damages under the state employer's liability act of 1911. The petition contained two causes of action: First, for damages accruing to the employee in his lifetime; and second, for damages consequent upon his death accruing to his per-

sonal representative for benefit of his dependents. The company pleaded settlement with the employee and release from liability. Plaintiff replied that the settlement and release were induced by fraud and mistake. A demurrer was sustained to the evidence offered in support of the reply. On consideration of the evidence it is *held*, the demurrer was properly sustained, and recovery on the first cause of action was properly denied."

2. "After a trial judgment rendered for plaintiff on the second cause of action. *Held*, the settlement and release were a bar to recovery on the second cause of action."

The facts in the two cases were practically identical, except that one arose under the Federal act, and the other under the state act, as is shown by the following parallel columns:

Goodyear Case. (Federal Act.)	**Fuller Case.** (State Act.)
Employed as car inspector on inter-state trains.	Employed as car repairer on intra-state work in shops.
Injury received July 31, 1919.	Injury received January 11, 1923.
Taken home and treated by doctors for several months.	Taken to hospital for several weeks.
Made settlement March 16, 1920, for $1135 and doctor bills and executed release 7½ months after injury.	Made settlement April 20, 1923, for $1150, and executed release about 3½ months after injury.
Died May 4, 1920, nearly 2 months after settlement.	Returned to work May 1, 1923, but was not well or strong; laid off in August, went back to hospital and died October 11, 1923, nearly 6 months after settlement.
Widow was appointed Administratrix and filed suit for damages to Goodyear and loss to beneficiaries, laid at $12,000.	Widow was appointed Administratrix and filed suit for damages to Fuller and loss to beneficiaries, for $10,000.

Answer filed, pleading release in bar.	Answer filed, pleading release in bar.
Reply filed that release was procured through fraud or mistake, etc.	Reply filed that release was procured through fraud or mistake, etc.
First trial, verdict for defendant. Reversed on ground that settlement by employe was not a bar to action by administrator for benefit of dependents.	Trial resulted in sustaining of demurrer to first count, and verdict for $5,000 on second count in favor of beneficiaries, for which judgment was entered. Defendant appealed.
Second trial, verdict for plaintiff for $5,000 under instruction that Federal act creates two rights of action, one in employe for his own suffering and loss, and the other in personal representative for benefit of dependents, and that the latter could not be released by the injured employe by any action taken by him, as it did not accrue until his death and he would have no control over it. Defendant appealed.	
July 10, 1926, opinion filed holding that the settlement and release by Goodyear were not a bar to the action by the personal representative for dependents on account of the death and approving the instruction above referred to. The judgment for $5,000 was affirmed. Certiorari granted Nov. 23, 1926.	July 9, 1927, opinion filed holding that the state liability act should be construed with the death statute, and therefore the settlement and release by Fuller were a bar to any action by the personal representative for dependents on account of the death. The judgment for $5,000 was reversed, with directions to enter judgment for defendant.

Thus it appears that the Kansas Supreme Court has construed two compensatory statutes, reaching the conclusion that a judgment for $5,000 should be affirmed under the Federal act and a judgment for $5,000 should be reversed under the state act, under like facts and similarly worded laws. The only reason given to justify

this action of the court is the statement on page 74 of the opinion:

> "It must not be forgotten that we are not interpreting the Federal law, or interpreting the Kansas act *according to the interpretation which, after much study and conflict of opinion, has been placed on the Federal law.*"

The decision under the state act, following previous Kansas decisions and the great weight of authority, is undoubtedly correct and the same conclusion should have been reached in construing the Federal act.

In Frese v. Chicago, B. & Q. R. Co., 44 S. Ct. 2, it was held:

> "If the engineer could not have recovered for an injury his administratrix cannot recover for his death. Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 70."

The reference to page 70 of 227 U. S. is very significant, for there is where appears the statement that "the foundation of the right of action is the original wrongful injury to the decedent" and that the new action "is a right dependent upon the existence of a right in the decedent immediately ~~upon~~ his death to have maintained an action for his wrongful injury", citing the long list of cases holding that there can be no recovery by dependents *where there had been a settlement or recovery by decedent during his lifetime.*

So, in the case now before the Court, if Goodyear could not have recovered for injuries sustained because he had in good faith accepted a sum in full and complete

settlement therefor, neither can his personal representative recover for his death. The right of a personal representative to recover is contingent upon the existence of a right in the injured employee to sue for such injuries. When he has extinguished that right by settlement or by suit and judgment, then that tangible substance which was created by the injury, having been rendered nonexistent by the act of the injured person in making settlement or obtaining judgment, nothing remains for his personal representative upon which to base an action. This Court stated in American R. Co. v. Didricksen, 227 U. S. 145, 33 S. Ct. 224, 225:

> "The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute."

This new and distinct right of action for the benefit of dependent relatives does not come into existence if the injury upon which the new right is based has been extinguished by the injured employee, either by settlement or by judgment. The situation would then be the same as though no injury had been suffered. In Centofanti v. Penn. R. Co., 90 Atl. 558, quoted from with approval in Western U. T. Co. v. Preston, 254 Fed. 229, 231, it is said that "the tort which produces death and not the death caused by the tort" is the basis of the action; and in the latter case it is stated: "Liability for the tort may also be released by the husband after

its commission by his acceptance of compensation for the injury he has sustained."

In St. Louis, etc., R. Co. v. Craft, 237 U. S. 648, 659, 35 S. Ct. 704, this Court declined to pass upon the question of what would have been the effect had there been a recovery by the decedent during his lifetime, for the reason that this question was not involved in the litigation then before it. However, in passing and reserving the question of the application of the concluding clause of Section 9 of the act (1910 Amendment), to wit, "But in such cases there shall be only one recovery for the same injury", it is quite significant that this Court referred to page 70 of the opinion in the Vreeland case in 227 U. S., where it is expressly stated:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

This reference to the Vreeland case must mean that the rule laid down in the cases cited in that paragraph governs such a situation and these cases hold that a settlement made or recovery obtained by an injured person is an absolute bar to a subsequent action under the statute for his death.

This is the conclusion reached in 17 Corpus Juris, 1250, where the text, based principally upon the Vreeland and Craft cases so far as the Federal act is concerned, is given as follows:

"But regardless of whether the statutory cause of action for death is regarded as strictly a new and independent cause of action, or as a transmitted, substituted, or survival right, it is almost everywhere held that a recovery by decedent for the personal injury to him is an absolute bar to the subsequent maintenance of an action under the statute for his death, and a final valid judgment on the merits denying a recovery has a like effect. *Doubtless this is the rule under the Federal Employers' Liability Act which expressly provides that there shall be but one recovery for the same injury.*" (Italics ours.)

II.

THE KANSAS SUPREME COURT DECLINED TO FOLLOW THE FEDERAL DECISIONS AND GREAT WEIGHT OF AUTHORITY IN CONSTRUING THE FEDERAL EMPLOYERS' LIABILITY ACT.

The precise issue presented in the case at bar was decided by the Court of Appeals of the ~~Third~~ Fifth Circuit in Seaboard Air Line R. Co. v. Oliver, 261 Fed. 1. This is the only Federal case which we have been able to find in the books which decides the exact question under discussion. The attention of the Kansas Supreme Court was especially called to this case, but its decision is in direct conflict therewith. The Oliver case involved the interpretation of the Federal Employers' Liability Act where an injured employee, engaged in interstate commerce, brought suit and recovered for injuries and subsequently dying, his personal representative brought suit under the survival provision of the Federal act. In its opinion the court said:

"So far as we are advised, the question whether the statute mentioned gives a deceased employee's personal representative the right to maintain an action when the employee himself has recovered for the injury he suffered has not heretofore been ruled on. It is not open to question that the statute provides for two distinct rights of action. One in the injured person for his personal loss and suffering, where the injuries are not immediately fatal; and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death, the damages recoverable in the one case not being the same as those recoverable in the other. Michigan Central R. R. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; St. Louis & Iron Mountain Ry. v. Craft, 237 U. S. 648, 35 S. Ct. 704; 59 L. Ed. 1160.

"Until the act of 1908 (35 Stat., 65, c. 149) was amended by the act of April 5, 1910 (36 Stat., 291, c. 143), the right of action given to the injured person was extinguished by his death. The act of 1908, with qualifications which need not now be mentioned, made a common carrier by railroad, while engaging in interstate commerce, 'liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of' designated relatives. The following is the section added by the amendment of 1910:

"'Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.'

"The amendment does no more than provide for the survival of the employee's right of action *if it remained in existence up to the time of his death*, and that 'in such cases'—that is, cases of survival of the employee's right of action—there shall be only one recovery for the same injury. *If the employee had no right of action immediately before he died, his personal representative has no right of action other than such as was given by the act before it was amended. The section added by the amendment of 1910 is not applicable to such a case.*

"The first section of the act makes the carrier liable in damages to the injured employee, 'or, in case of the death of such employee, to his or her personal representative, for the benefit,' etc. The two distinct rights of action are given in the alternative or disjunctively. *The language used indicates the absence of an intention to allow recoveries for the same wrong by both the injured employee and, in case of his death, by his personal representative;* only one recovery being allowed when the injured employee dies without having enforced the right of action given to him. *It seems to be a fair inference from that language that the right of action given to the injured employee's personal representative was intended to be unenforceable after the enforcement and satisfaction of the one given to the employee himself.* From the fact that one wrong gives rise to two or more rights of action, it does not follow that there can be more than one recovery based on that wrong. An intention to permit more than one recovery for an injury to an employee for which a statute gives a right of action to the employee, or, in case of his death, to his personal representative, is not to be inferred, in the absence of language evidencing such intention, where the wrong upon which the rights of action given are based is a tort, the inception and continued existence of which is dependent upon conduct of the

employee at the time of, or subsequent to, the injury."

Then, on page 4, the court continues:

"Nothing in the act now under consideration indicates an intention to make the injured employee's right or power to deal with his employer with reference to the wrong for which the latter is made liable any different from that usually possessed by the victim of a tort. Ordinary incidents of a right to recover damages for a tort are the powers of enforcing the tort-feasor's liability therefore by suit and of discharging all liability incurred for a consideration received. Can it properly be said that the act has the effect of depriving an injured employee of the benefit of getting what his employer may be willing to pay to obtain a discharge of all liability incurred? We think not. *So long as the employee lives, he alone can sue for the tort. The act does not indicate a purpose to make the amount he may recover any less than it might have been if, in case of his death, no right of action had been given to his personal representative. The right of action conferred on him is not so restricted as to prevent his enforcing all liability the employer is subjected to for the wrong done to the employee. So long as the injured employee survives, there is no limitation on his right to recover all that, in such a situation, is recoverable from the employer for the one tort committed.* Language used in the first section of the act fairly negatives the conclusion that a deceased employee's personal representative is given the right to maintain an action on the tort against the deceased, for which the latter sued and recovered during life. *If, during the life of the injured employee, his employer's liability for the tort is extinguished by any occurrence ordinarily having that effect, the employee's personal representative has no right of action for*

the injury, as the single cause of action upon which a suit by him must be based has ceased to exist.

"The Federal Employers' Liability Act differs from Lord Campbell's Act, and other similar statutes, in that the former does not in terms make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he died. *The defendant in error's lack of right to maintain his suit in such a situation as the one under consideration is due, not to the decedent's lack, immediately prior to his death, of an enforceable right of action for the injury he sustained, but to the fact that the cause of action counted on has been extinguished by payment of the judgment recovered by the decedent for the wrong he suffered.*" (Italics ours.)

The Oliver case arose from a situation similar to that presented here. There was an injury under the Federal act. A suit was brought and a judgment obtained; whereas, we have a settlement and a release—a contract. A judgment paid and a contract performed are entitled to equal sanctity. They are of equal force in law. If the judgment in the Oliver case extinguished all causes of action under the act, and unquestionably it did so, as held in the opinion, so the contract of settlement in the present case with the injured employee, Goodyear, and the release executed by him, extinguished all rights of action under the act. The Oliver case is directly in point and is a Federal decision by the United States Circuit Court of Appeals that is entitled to great weight, as it was based upon the Vreeland and Craft cases, the court expressly stating that the ques-

tion was one of first instance, as it had not yet been ruled upon. It recognized the two distinct rights of action under the Employers' Liability Act, and the effect of the 1910 amendment. It is clear and beyond cavil that where under the act, a right of action is given the injured employee and he makes settlement, any cause of action for his subsequent death, that might otherwise go to a personal representative, is extinguished.

The Oliver case was followed in Rodgers v. Pennsylvania R. Co., 19 Fed. (2nd) 522, 523, (decided April 13, 1927) in which it was held that the provisions of the Pennsylvania death statute were inapplicable in cases arising under the Federal Employers' Liability Act, and that under the Federal act the right of action by a personal representative was barred where the deceased lived more than two years after an accident and brought no action for the injury, as the right of the personal representative was dependent upon the existence of a cause of action in the deceased at the time of his death.

In the opinion the court said:

> "The statute says 'any right of action given by this act shall survive . . . .' *Here, however, the deceased had no right of action when he died. Therefore, how can it be said that anything survived to the representative?* By the act of 1908 the cause of action for conscious pain and suffering did not survive to the representative. By virtue of the amendatory act of 1910, namely, Section 9, the cause of action does survive. However, 'the amendment does no more than provide for the survival of the employee's right of action, if it remained in existence up to the time of his death, and that "in such cases"—that is, cases of survival

of the employee's right of action—there shall be only one recovery for the same injury. If the employee had no right of action immediately before he died, his personal representative has no right of action other than such as was given by the act before it was amended. The section added by the amendment of 1910 is not applicable to such a case.' Seaboard Air Line Ry. Co. v. Oliver (C. C. A.) 261 F. 1, at page 2.

"Concerning the right of action given the personal representative, the United States Supreme Court in Central R. Co. v. Vreeland, 227 U. S. 59, at pages 68, 69, 33 S. Ct. 192, 195 (57 L. Ed. 417, Ann. Cas. 1914C, 176), decided:

"'This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he survived. . . . It is a liability for the loss and damage sustained by relatives dependent upon the decedent. . . . But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.'

"*The deceased could not have maintained an action brought immediately before his death, for the statute of limitations was a bar; and, since the administratrix's right is predicated upon the existence of a right of action in the deceased immediately preceding his death, the administratix's right is barred.*" (Italics ours.)

The Federal act is not entitled to receive a liberal and expansive application, as the court so held in Winfree v. Ry. Co., 173 Fed. 65, 66:

"The statute in question, while it is remedial in the sense that it affects the remedy in accident cases, is not of the nature of those remedial statutes which have received a liberal and expansive application at the hands of the courts, such as statutes intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings, or to give effect to the acts and contracts of individuals according to the intent thereof. It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred." (Affirmed 227 U. S. 296.)

In deciding the case at bar the Kansas Supreme Court seems to have given great weight to the case of Rowe v. Richards, 35 S. D. 201, 215, 151 N. W. 1001, L. R. A. 1915E, 1075, by quoting therefrom in its first opinion (Goodyear v. Davis, 114 Kan. 557, 570), and referring to a few other cases which are contrary to the great weight of authority, some of which involved penal statutes. Not one of these cases was based upon the Federal Employers' Liability Act, and they are decidedly in the minority. In Rowe v. Richards it was acknowledged in the opinion "that a large number, and perhaps a majority of the cases wherein the precise question was under consideration, have held in accord with appellant's view", and there were two vigorous dissenting opinions by Justices Smith and Gates, which are set out in L. R. A. 1915E at pages 1088 and 1093. In the annotation supplementing this case beginning at page

1095, it is shown to be a stray case against the overwhelming weight of authority, as is manifest by the following extracts:

> "It is believed that the better rule will be found to be that based upon the theory that the cause of action is the injury to the person of the deceased for which coexistent remedies, or an exclusive remedy is given. *But the cause of action must be existing at the time of his death in order that any remedy may be invoked by or in behalf of decedent's estate or statutory beneficiaries.*" (P. 1095.)

> "One of the logical results of the doctrine that these statutes authorize separate and distinct causes of action is the case of Rowe v. Richards, which in effect sustains a double recovery for the decedent's destroyed earning power, and prevents the wrongdoer from settling with the injured person for the injury, and thereby absolving himself from further liability; *but, under the doctrine of this case, like the sword of Damocles there constantly hangs over a person through whose negligence is caused an injury to the person of another, the danger of being haled into court years after the injury, to answer to the statutory beneficiaries, on the ground that the injury was the cause of the death.*" (P. 1097.)

This case is further criticized in another note in L. R. A. 1915E 1118, as follows:

> "Thus in Rowe v. Richards, ante, 1095, the court says that it would be the limit of absurdity to contend that a wife who had been forcibly abducted could, when settling with the wrongdoer for the wrong done her, also bind her husband by settling for the wrong done him,—the violation of his right to her services, 'yet such a case would in its underlying principles be on all fours with the case before

us. . . . . The two causes of action would, just as in the case of injury to and resulting death of a husband, result from one wrongful act.' This example, the court proceeds to say, 'shows the absurdity of the contention that to allow a recovery for the injury suffered by the deceased and for that suffered by the next of kin is to allow the recovery of double damages for one wrong.' *The court then unconsciously points out its own error, as well as the distinction between the hypothetical case of the abducted wife and an injury to a married man which results in his death.* It says: 'Of course it is a recovery of two items of damages resulting from one wrongful act, but it is not the recovery of two items of damages for one injury.' In the case of the abducted wife, the wrongful abduction is an injury to the wife, and the deprivation of the husband's right to her services is an injury to him, —two entirely separate and distinct matters. *In the case of the injury to a married man which results in his death, however, the principal injury of which the widow can complain is the destruction of her husband's earning power, and as to this element it is clear that if she receives compensation therefor to the extent of the pecuniary loss thereby resulting to her, and the injured person or his estate is also permitted to recover for his destroyed or impaired earning power, then, as a matter of fact, the court does permit the recovery of two items of damage for the one injury.*"

Also in another note on page 1166, in which it is said:

"In Rowe v. Richards, ante, 1095, which holds contrary to the rule stated, in the majority opinion on the point it is said that the cause of the two injuries—that to the husband and that to the wife —(Assuming that the husband was the injured person) is the same, the one wrongful or negligent act, but the right violated in the one case is entirely

different from the right violated in the other. And it is further said that this right of the wife may never accrue, and from its very nature cannot accrue until the death of the husband.

"In view of the position of the court that this right of the wife, which, it is conceded, rests upon the wrongful or negligent injury of the husband, and which may never accrue, cannot be affected by any act of the injured person in settling with the wrongdoer for the injury, it is proper to inquire more specifically as to the nature of the right. . . .

"The liability is based almost entirely upon the loss occasioned by the destruction of the decedent's earning power, and according to the court's concession, the liability to the wife or next of kin gives her no right to complain of the injury during the life of the injured person. He may survive his injury for years, and the injury may be of such a character as totally to destroy his earning powers, and make him a helpless burden upon his wife; nevertheless she has no right to complain, and, should he outlive her, she never has such right.

"Under this theory, if the injured person sues to recover for the injury in his lifetime, what is to be the measure of damages where the effect of the injury is the total destruction of his earning power? If it be said that the measure of damages is compensation for pain and suffering and loss of earning power, is the latter to be based upon his life expectancy in view of the injury, or upon his life expectancy in the condition he was before the injury? *If the latter, and full compensation is made for destroyed earning power, how can it reasonably be said that the widow or next of kin have suffered any pecuniary loss by the destruction, through the decedent's death, of an earning power for which compensation has already been made. And it is to be remembered that the death of the injured person*

brings to them indirectly from the wrongdoer, by way of inheritance from the deceased, not only full compensation for their pecuniary loss of the support of the deceased, but more than that; for had it not been for the injury, there was always the contingency of the death of the deceased, or the widow, or next of kin, or his failure always to recognize his legal or moral duty to support such parties.

"After these persons have received more than full compensation for a pecuniary loss, certainly a statutory provision should plainly require what might properly be termed a bounty in the way of additional compensation, before the court construes it to give such bounty. *On vague and obscure language the lawmaking power ought not to be convicted of intending legislation so unreasonable as to reward a widow for the death of her husband through negligence, or to thus punish the offender, where the negligence complained of is usually caused by the disobedience or fault of a servant, in the employment of whom due care has been taken.*

"And in view of the apparent injustice resulting from this rule, an injustice not only to the defendant, but also to the injured person should he desire to settle for the injury or recover damages therefor, and in consideration of the disagreements on the part of the courts as to the effect of these statutes, it would seem advisable to dispose of the matter according to the apparent intent of the statutes, without indulging in any refinement of reasoning as to whether these statutes create one or more actions, or whether the action created is a new cause of action, or merely the remedy for the original cause of action." (Italics ours.)

Another commentator in an annotation following the first reported decision of the case at bar, in 39 A. L. R. 583, referred to the case of Rowe v. Richards, as follows:

"While it is a matter of serious doubt whether the South Dakota and similar statutes create a new and distinct cause of action in favor of the statutory beneficiaries, or merely give a new remedy to enforce the right of action which the injured person had, and which would have abated upon his death had it not been for this statute authorizing the action notwithstanding the death of the injured person, yet, in either event, the right of action or remedy is founded upon the negligent or wrongful act. *And, so far as concerns statutes of the character under consideration, where the tort is settled for by a release by the injured person, or by merger into a judgment against the tort feasor, there remains nothing for the statute to operate upon.* In this regard, the terms of the statute, construed in connection with the purpose or object sought to be achieved thereby, clearly imply or require, as a condition of recovery, that there shall exist in the injured person, at the time of death, a right of action to recover for the injury.

"*The authorities relied upon in the Rowe case did not pass upon the effect of a release by the injured person or the recovery by him of a judgment for the damage suffered from the injury. Most of them considered the right to revive a pending action brought by the injured person in his lifetime, and also to prosecute an action under statutes similar to Lord Campbell's Act for the benefit of the statutory beneficiaries. Fundamentally, the questions raised in the two classes of cases are very different.* In the first class, the question, i. e., of the recovery of a judgment by the injured person,

or the execution of a release, involves the point, heretofore referred to, as to the effect of the fact that at the time of the death of the injured person there existed in his favor no right of action to recover for the injuries. *In cases involving the right to revive a pending action, there not only existed in the injured person, at the time of his decease, a right of action to recover damages for the injury, but he was undertaking to enforce it.* In such case a holding permitting the revival of this action, and also the prosecution of an action under a statute similar to Lord Campbell's Act, does not lead to any *duplication of the damages*, and does not require a construction of the statutes leading to the assessment of damages in the nature of *a penalty —a construction which would violate the evident intent and purpose sought by these statutes, which are clearly compensatory only.*" (Italics ours.)

If "law is the perfection of reason", as stated by learned commentators, no decision should be permitted to stand that creates a situation which makes compensatory statutes penal, permits double recoveries and renders it impossible to make settlements, although the parties themselves are willing and anxious to dispose of the controversies between them.

In 39 A. L. R. 579, there is an elaborate note following the report of the first decision in the case at bar, upon the question as to whether a release by or judgment in favor of an injured person operates as a bar to an action for his death, showing that she overwhelming weight of authority is in the affirmative and *that the decision of the Kansas Supreme Court in the case at bar is contrary to the almost universal construction*

placed by the courts upon compensatory statutes. This annotation starts out by saying:

> "The more general view is that statutes of the nature of Lord Campbell's Act are not survival statutes, but create a new cause of action distinct from any the deceased might have had, had he survived. 8 R. C. L. 725.
>
> "By the great weight of authority, however, where the statute in effect gives a remedy to recover damages where the death of a person is caused by the negligent or wrongful act of another, such remedy depends upon the existence in the decedent, at the time of death, of a right of action to recover damages for such injury; hence if by a recovery of a judgment for damages due to the injury, or by a settlement with the wrongdoer, the injured person releases his cause of action, such release, in the absence of fraud or mistake, will preclude a recovery by his personal representative of damages based upon the same negligent or wrongful act."

This is followed by a list of Federal and State authorities, most of which have been referred to herein. For ready reference, this list is as follows:

United States.—Seaboard Air Line R. Co. v. Oliver (1919), 171 C. C. A. 597; 261 Fed. 1 (Federal Employers' Liability Act); Lindsay v. Chicago, B. & Q. R. Co. (1915), 141 C. C. A. 131; 226 Fed. 23; Michigan C. R. Co. v. Vreeland (1912), 227 U. S. 59, 57 L. Ed. 417, 33 S. Ct. 192, Ann. Cas. 1914C, 176 (comparing Lord Campbell's Act; Federal Employers' Liability Act).

Delaware.—Perry v. Philadelphia, B. & W. R. Co. (1910), 1 Boyce 399, 77 Atl. 725.

Georgia.—Southern Bell T. & T. Co. v. Cassin (1900), 111 Ga. 575, 50 L. R. A. 694, 36 S. E. 881 (similar to Lord Campbell's Act); Morton v. Georgia R. & E. Co. (1916), 145 Ga. 516, 89 S. E. 488 (similar to Lord Campbell's Act).

Illinois.—Holton v. Daly (1882), 106 Ill. 136 (similar to Lord Campbell's Act); Mooney v. Chicago (1909), 239 Ill. 414, 88 N. E. 194 (similar to Lord Campbell's Act); Bruns v. Welte (1905), 126 Ill. App. 541 (similar to Lord Campbell's Act).

Indiana.—Hecht v. Ohio & M. R. Co. (1892), 132 Ind. 507, 32 N. E. 302 (similar to Lord Campbell's Act); Golding v. Knox (1914), 56 Ind. App. 149, 104 N. E. 978; Haskell & B. Car Co. v. Logermann (1919), 71 Ind. App. 69, 123 N. E. 818.

Kansas.—Sewell v. Atchison, T. & S. F. R. Co. (1908), 78 Kan. 1, 96 Pac. 1007; Berner v. Whittelsey Mercantile Co. (1915), 93 Kan. 769, 145 Pac. 567, Ann. Cas. 1916D, 350 (similar to Lord Campbell's Act); (to which should be added Fuller v. Atchison, T. & S. F. R. Co., 124 Kan. 66, 257 Pac. 971 (1927), in which it is held that under the state liability act in connection with Lord Campbell's Act statute, settlement with injured person is complete bar to an action by personal representative for his death).

Kentucky.—Louisville R. Co. v. Raymond (Louisville R. C. v. Taylor) (1909), 135 Ky. 738, 27 L. R. A. (N. S.) 176, 123 S. W. 281; Perry v. Louisville & N. R. Co., 199 Ky. 396, 251 S. W. 202 (similar to Lord Campbell's Act).

Maryland.—State use of Melitch v. United R. & E. Co. (1913), 121 Md. 457, L. R. A. 1915E, 1163, 88 Atl. 229 (similar to Lord Campbell's Act).

Michigan.—Sweetland v. Chicago & G. T. R. Co. (1878), 117 Mich. 329, 43 L. R. A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648 (similar to Lord Campbell's Act); Mehegan v. Boyne City, G. & A. R. Co. (1913), 178 Mich. 694, L. R. A. 1915E, 1170, 141 N. W. 905, 148 N. W. 173 (similar to Lord Campbell's Act); Lincoln v. Detroit & M. R. Co. (1914), 179 Mich. 189, 51 L. R. A. (N. S.) 710, 146 N. W. 405 (similar to Lord Campbell's Act).

Mississippi.—Hamel v. Southern R. Co. (1915), 108 Miss. 195, 66 So. 809 (similar to Lord Campbell's Act); Harris v. Illinois C. R. Co. (1916), 111 Miss. 623, 71 So. 878 (similar to Lord Campbell's Act).

Missouri.—Strode v. St. Louis Transit Co. (1906), 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084 (referred to as transmitted action); Schmelzer v. Central Furniture Co. (1913), 252 Mo. 12, 158 S. W. 353.

New Hampshire.—Cogswell v. Boston & M. R. Co. (1917), 78 N. H. 379, 101 Atl. 145, survival action).

New York.—Littlewood v. New York (1882), 89 N. Y. 24, 42 Am. Rep. 271 (similar to Lord Campbell's Act); McGahey v. Nassau Electric R. Co. (1900), 51 App. Div. 281, 64 N. Y. Supp. 965, affirmed in (1901) 166 N. Y. 617, 59 N. E. 1126 (similar to Lord Campbell's Act); Casey v. Auburn Teleph. Co. (1913), 155 App. Div. 66, 139 N. Y. Supp. 579; Dibble v. New York & E. R. Co. (1857), 25 Barb. 183 (similar to Lord Campbell's Act).

North Carolina.—Edwards v. Interstate Chemical Co. (1916), 170 N. C. 551, 87 S. E. 635 (similar to Lord Campbell's Act).

Ohio.—Solar Ref. Co. v. Elliott (1898), 15 Ohio C. C. 581, 8 Ohio C. D. 283 (similar to Lord Campbell's Act).

Pennsylvania.—Hill v. Pennsylvania R. Co. (1896), 178 Pa. 223, 35 L. R. A. 196, 56 Am. St. Rep. 754, 35 Atl. 997 (similar to Lord Campbell's Act).

South Carolina.—Price v. Richmond & D. R. Co. (1890), 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413 (similar to Lord Campbell's Act); Rish v. Seaboard Air Line R. Co. (1916), 106 S. C. 143, 90 S. E. 704 (similar to Lord Campbell's Act).

Tennessee.—Brown v. Chattanooga Electric R. Co. (1898), 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415 (similar to Lord Campbell's Act).

Texas.—Thompson v. Ft. Worth & R. G. R. Co. (1909), 97 Tex. 590, 80 S. W. 990, 1 Ann. Cas. 231 (similar to Lord Campbell's Act); St. Louis Southwestern R. Co. v. Hengst (1904), 36 Tex. Civ. App. 217, 81 S. W. 832 (similar to Lord Campbell's Act); Blount v. Gulf, C. & S. F. R. Co. (1904), 82 S. W. 305 (similar to Lord Campbell's Act).

Vermont.—Legg v. Britton (1892), 64 Vt. 652, 24 Atl. 1016 (similar to Lord Campbell's Act).

Washington.—Broshe v. Washington Water Power Co. (1916), 92 Wash. 574, 159 Pac. 791.

Wisconsin.—Brown v. Chicago & N. W. R. Co. (1899), 102 Wis. 150, 44 L. R. A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255 (similar to Lord Campbell's Act).

England.—Read v. Great Eastern R. Co. (1868), L. R. 3, Q. B. 555 (Lord Campbell's Act); Griffiths v. Dudley (1882), L. R. 9, Q. B. 357 (Lord Campbell's Act).

Canada.—British Columbia Electric Co. v. Turner (1914), 49 Can. S. C. 470, 18 D. L. R. 430, Ann. Cas. 1914D, 490 (similar to Lord Campbell's Act).

The minority rule is shown in some three or four cases at the bottom of the list (39 A. L. R. 580), in which the case at bar is the only case based upon the Federal Employers' Liability Act. It is listed with the discredited case of Rowe v. Richards, supra, and makes a pitiful showing as compared with the great weight of authority.

In respondent's brief opposing the granting of the writ of certiorari herein, attention was called on page 11 to an article in the Michigan Law Review, Vol. XXIII, p. 114, on the subject of "Rights of Action under Death and Survival Statutes." This article was also published in the American Law Review, Vol. LIX, p. 239, to which we will refer. After introduction of the subject the author says (p. 243):

> "It is the weight of authority in this country that a judgment in favor of the injured person prior to his decease will bar the action of the administrator under Lord Campbell's Act for the benefit of the next of kin. *And, consistently enough, most courts hold that an accord and satisfaction or release for a consideration by the injured person will bar the action for his death.*"

The entire article then proceeds with a labored attempt to show that the great weight of authority is based upon "unsound lines of reasoning," contending that the "reasoning" contained in some three or four cases adopting the minority rule should be followed, regardless of "however sound these (majority) decisions may be as a matter of practical result" (p. 246). The principal case relied upon for the "sound reasoning" is the discredited case of Rowe v. Richards, supra (p. 247).

Is it not the purpose of the law to bring about practical results rather than to create chaotic conditions by theoretical refinements of so-called "reasoning"?

In discussing the Federal Employers' Liability Act the author sees fit to criticise the opinion of this Court in the Vreeland case, as follows (p. 263):

> "And elsewhere in the opinion the statement is made that the Federal Act is 'essentially identical with Lord Campbell's Act.' Obviously this latter statement is not true, for here there is no condition express or implied in the statute that there must have been a right in decedent to have sued immediately before his death. The two statutes are essentially different and one of the principal reasons given by the state courts in refusing relief after death is not present under the Federal Act."

The author then concludes with the illogical statement that even though it might be held that a judgment obtained during the lifetime of the injured person would be a bar to a further action, yet a settlement and release should not be a bar. He says (p. 264):

> "However, even if the Supreme Court should stick to its *dicta* and hold that a suit on one right, before or after death, barred a suit on the other, it could still with logic hold that a release or accord and satisfaction of one claim would not bar a suit on the other. For the basis of refusal of relief where there are two suits brought would be in the words of the statute, that but one action shall be brought, and this obviously does not apply to the case where there has been a release or accord and satisfaction."

Certainly, the two rights of action, one in favor of the injured person and the other in favor of the personal representative, in case of death, are both dependent upon the *original injury*. If the *injury* itself is wiped out by the action of the person upon whom it was inflicted, either by settlement or by judgment, then it must follow, logically, *that the tort is no longer the basis of any right of action.*

Where the state law is involved, Kansas is in line with the twenty-one states which interpret the Lord Campbell's Act statute as preventing further litigation after settlement has been made with the injured person prior to death, *but stands alone in placing an interpretation upon the Federal Employers' Liability Act which renders it impossible to make settlement with an injured employee during his lifetime.*

This established interpretation by the courts of 21 states (including previous and later decisions in Kansas), as well as England, where the Lord Campbell's Act originated, and by the courts of Canada, as well as the Federal Court of Appeals in the Oliver case,

should be accepted as the settled law upon the subject in the interest of uniformity of judicial decision. The Oliver case directly involved the Federal Employers' Liability Act, passed upon the exact question at issue in the case at bar, and should be followed.

Any other interpretation of the Federal Employers' Liability Act would make a compensatory statute penal, encourage litigation, permit a double recovery when the statute itself says there shall be but one recovery, and render it impossible to make a valid settlement in claims of this character during the lifetime of the injured person. Surely reason, justice, public policy and overwhelming weight of judicial decision, protest against such a construction.

III.

INSTRUCTION NO. 8 (ASSIGNMENT OF ERROR NO. 2) IS CONTRARY TO PUBLIC POLICY FAVORING COMPROMISE AND SETTLEMENT OF DISPUTES.

The courts have held repeatedly that the law favors the compromise and settlement of disputes. This rule of public policy is well stated in 12 Corpus Juris, at page 336, as follows:

> "The law favors the compromise and settlement of disputed claims and will sustain such settlements if fairly made, because it is to the interest of the state that there should be an end to litigation."

The text is supported by several columns of authorities.

Instruction No. 8 states that the Federal act creates two separate and distinct rights of action resulting from an injury, one in the injured employee for his suffering and loss, and one to his personal representative for the benefit of his surviving widow and children in the event death results from the injury, and then concludes with the following startling declaration of law:

> "And you are instructed that the latter cause of action could not be released by the deceased, Lewis Goodyear, by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part."

If this instruction places a correct interpretation upon the Federal act, it presents a situation where no settlement can be made during the lifetime of an employee injured in interstate commerce. As no administrator or personal representative could be appointed until the death of the injured employee, there would be no possible way to make a valid settlement. There would be no inducement to attempt settlement and pay a large sum of money even if both parties were willing to settle upon any terms and even though the settlement would be of great benefit to the injured employee as well as his dependents while he lived, so long as there was a prospect of another suit upon his death in favor of a personal representative for another unlimited sum with possibility of another large recovery at the whim of a jury, for alleged pecuniary loss to dependents. This is

certainly against public policy favoring compromise and settlement and the ending of litigation.

It is also contrary to the reasoning of this Court in Reading Co. v. Koons, 46 S. Ct. 405, in which it was held that an action under the Federal Employers' Liability Act was barred two years after death and not from the date an administrator was appointed. This Court said (p. 407):

> "The very purpose of a period of limitation is that there may be, at some definitely ascertained period, an end to litigation. . . . An interpretation of a statute purporting to set a definite limitation upon the time of bringing action, without saving clauses, which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done, would, we think, defeat its obvious purpose."

Is it not equally true, that an interpretation of the same statute, to the effect that the injured person, for a valid consideration, cannot release the employer for all damages and thus extinguish any cause of action that might otherwise be enforced by a personal representative upon the death of the injured person, creates a situation which would leave the employer "subject indefinitely to actions for the wrong done"? Such a construction encourages litigation instead of ending it.

IV.

PUBLIC POLICY DEMANDS UNIFORMITY OF JUDICIAL DECISIONS.

Uniformity of decision is sought as a matter of public policy. The construction given to the Federal act by trial court and affirmed by the Kansas Supreme Court presents a situation where there is one rule in Kansas denying further recovery where settlement has been made under the state death statute and state liability act, which is almost an exact counterpart of the Federal act (Berner v. Merc. Co., supra, and Fuller v. A. T. & S. F. R. Co., supra), and another and different rule permitting further recovery where settlement has been made under the Federal act, which this Court has pointed out is essentially identical with Lord Campbell's Act. The rule which was applied in the Fuller case should have been applied to the case at bar, as the statutes are both compesatory in their application. When a rule of law has become settled, it is most unfortunate to have a decision made that changes the construction established by a long line of decisions.

This is illustrated by the opinion in Bruns v. Welte, supra, in which it is said (126 Ill. App. p. 547):

> "Until the time of his death Charles J. Welte could not have maintained an action, for he had settled for his claim and released the defendant. So, within the express terms of the statute reasonably construed, no right of action accrued to the personal representatives. This statute, the Act of 1853, has been in force for upwards of fifty years.

In all that time it does not appear, from the reported decisions of our Supreme Court, except in the case of Holton v. Daly, supra, that the statute has ever been invoked to impose a double liability for negligence causing injury resulting in death. The failure to prosecute such claim is not due to lack of occasion or circumstances under which it might have been asserted if the meaning of the statute now contended for by appellee prevailed. Injury through negligence, settlement with the injured party and his subsequent death from the injuries received, have been of frequent occurrence, and the failure to bring suit by or in behalf of the widow or next of kin, notwithstanding the settlement, may fairly be attributed to the popular and professional interpretation of the statute and understanding of the law, that such settlement was a bar. Throughout the period parties have been injured by negligence, suit brought, judgments obtained and satisfied in the lifetime of the injured party or the claims for damages settled or compounded in good faith in the understanding of all parties concerned, including those who, by the death of the injured party, would become the widow or next of kin, that the judgment or settlement was final and complete as against any further liability of the defendant. To now hold otherwise and construe the statute that a right of action survives to the personal representatives, notwithstanding a satisfied judgment or settlement by the person injured, would operate as a retroactive amendment to the law affecting established property rights. If this is the meaning now to be given the statute, there is scarcely limit or termination of the litigation invited and immediately to follow. By operation of the law, so interpreted, the right of action in the widow and next of kin is postponed or suspended until the death of the injured person, after which such action may be brought without regard to the lapse of time intervening the negligence

complained of and the commencement of the suit; and during this indefinite period, possibly twenty, thirty or fifty years, no settlement by judgment or otherwise may be effected between the parties concerned. To hold this would awaken and encourage controversy contrary to the policy of the law which, in wholesome restraint of prolonged dispute and litigation, favors compromise, settlement and repose. This lack of limitation is suggestive that the legislature never intended that the statute should be so construed. We are of opinion that the settlement and release made by Charles J. Welte in his lifetime is a complete bar to an action by his personal representatives for the benefit of his widow and next of kin, and that the court erred in sustaining the demurrer to the special pleas. The judgment of the Circuit Court will, therefore, be reversed."

The uncertainty of the law has been deplored by the layman for many years. When an unbroken line of decisions for fifty years is swept away and an exception made in legal interpretation that will permit a double recovery where not permitted before, in the event there should happen to be one interstate car in a train upon which a serious injury occurs, making the Federal act applicable, and only a single recovery or a different method of recovery or no recovery, where interstate commerce is not involved, it is beyond the grasp of the ordinary citizen and makes him wonder.

If the interpretation placed upon the Federal Employers' Liability Act by the Kansas Supreme Court is not reversed by this Court, no employer within the Federal act could settle with his injured employee and rest in anywise secure on such settlement. Medical experts of

renown disagree, but it is not generally the prominent physicians who are called in personal injury cases. We cannot conceive a case in which a personal representative of a deceased railroad employee would not have medical testimony to the effect that a certain person in the opinion of the medical witnesses died as a result of injuries which he had sustained—one, two, five, ten, fifteen or twenty years before. Indeed, the court instructed the jury in this case as the law (Instruction No. 41, R. 37) that if the jury should find from the evidence that Goodyear was injured by the negligent act of the defendant "and which act accelerated a diseased condition existing at the time of the injury, thereby hastening and prematurely causing death of said Lewis Goodyear, that the defendant would be liable for the death of said Goodyear, even though the disease which he had at the time of his injury might have resulted in death at a later time without having received said injury." In substance the instruction probably declared the law as existing in most States. The injury itself was not sufficient to cause death, but coupled with other existing infirmities might have hastened the death. So declares the law. But no State had ever held that an injured person does not hold within his power the right to settle with a tort-feasor for the wrongful injury. Neither did Congress intend in the employers' liability act to write any such startling declaration of law that an injured employee could not settle and extinguish absolutely all rights of action in his favor and in favor of all other persons however dependent upon him and

however aggravated the negligence may have been which caused the injury. Generally, fair sums are paid in settlement; for the loss of a leg judgments of from ten to twenty thousand dollars have been upheld. Assume that an employee engaged in interstate commerce is injured and loses a leg in circumstances which indicate negligence on the part of the employer. A settlement is made in good faith for $20,000. The injured employee is given a job as tower operator, which pays him as much or more than he earned in his employment when injured. He survives ten years. An infection sets up in the stump of the leg and he dies as a result. Of course, there would be no infection in the stump of his leg if his leg had not been off, so unquestionably his end is brought about prematurely through the *injury* originally sustained. At the trial cumulative numbers of physicians would testify that in their opinion the death of the employee was caused by the injury which he sustained many years before, resulting in the loss of his leg. Under instruction No. 8 given by the court a widow and flock of children born subsequent to the loss of the leg, all dependent upon this employee, could bring suit through a personal representative and obtain a judgment for $20,000 more, notwithstanding the fact that the employee himself and all of his dependents had had the benefit of the money previously paid in settlement and the dependents had received it by inheritance upon his death, thus permitting a double recovery.

The chaos and confusion spread broadcast over 250,000 miles of railroad in the United States by a decision of this character is hard to visualize.

V.

THE RELEASE.

The release attached to the answer (R. 13) and which was upheld by the jury as a valid contract of release, is broad enough to cover everything in the way of damages on account of the claimed injuries as well as all causes of action growing out of the accident.

It is provided therein that Goodyear compromised, settled and adjusted all matters growing out of the injuries in question, and released and discharged the Director General of Railroads, and his successors, as well as the railroad operated by him and the United States Government,

> "from any and all liability for all claims and demands for all damages resulting from the injuries received by me at the time and place above stated, including such injuries as may hereafter develop as well as those now apparent, and also do release and discharge them, and each of them, of all suits, actions, causes of action and claims for damages on account of injuries to my person, as well as damages to my property, if any, which I have or might have arising from, growing out of, or in anywise connected with the accident above referred to, and do hereby acknowledge full satisfaction of all such liability and causes of action.
>
> "It is further expressly understood and agreed that this release shall be deemed to be and shall be a complete bar to any action which might otherwise be brought, either by law, or under any state or federal workmen's compensation act, employers' liability act, labor law, or any other statute for the recovery of compensation or damages on account of

> said injuries . . . for the benefit of any person whomsoever or estate whatsoever."

The parties settled not only the amount but the cause of action itself, and all questions of interstate commerce, assumption of risk, negligence or otherwise. Goodyear was placed in exactly the same position he would have occupied if uninjured. The freedom of contract implies all of this, and to say that a man may recover enough to make him whole throughout his expectancy of life, give his family the benefit of it until he dies, permit them to inherit it upon his death, and then, that the family may recover more through an action by a personal representative, would be an arbitrary, capricious and unconstitutional exaction. The effect of instruction No. 8 was to overturn the contract of release found by the jury to have been fairly and honestly made. Shall it be that citizens can no longer settle their differences only so long as the contracting parties live, then to have them overturned and ignored by surviving widows and children? Has Congress written such a law that an employer may no longer deal finally with his employee in case of injury? Shall the employer refuse settlement to his injured employees and be made to pay them at the conclusion of a lengthy, expensive and disagreeable lawsuit, with full knowledge that after death of the employee, the employer will again be met with a demand for more money and will be confronted with the subtle suggestion that in Goodyear v. Davis it was declared as the law of the land that he should again have to open the purse strings

and pay? We believe Congress contemplated no such interpretation of its act, nor do the decisions of the courts justify such holding. Under such a construction injuries occurring in interstate commerce under a statute that is purely compensatory would be incapable of compromise.

This Court holds that binding contracts of release can be made, even in advance of an injury. In Northern Pac. v. Adams, 192 U. S. 440, 453, it was held that the conditions of a free pass were valid and binding and formed "a contract which neither party was bound to enter into and yet one which each was at liberty to make and no public policy was violated thereby." In the first headnote it is said:

> "And if the passenger is injured or killed while riding on such a pass gratuitously given, which he has accepted with knowledge of the conditions therein, the company is not liable therefor either to him or to his heirs, in the absence of willful or wanton negligence."

In Kansas City S. R. Co. v. Van Zant, 43 S. Ct. 176, the second headnote is as follows:

> "An interstate pass issued to passenger who was permitted to receive it under the Hepburn Act, can provide that the carrier shall not be liable for injuries caused by any accident."

Certainly the law does not contemplate two recoveries of damages under a compensatory statute, which itself provides that "there shall be only one recovery for the same injury," nor a construction that would make such

a statute penal in its application. It seems evident, therefore, that under the Federal Employers' Liability Act, a fair contract of release made with an injured employee during his lifetime extinguishes any cause of action that otherwise might accrue to a personal representative, upon his death.

The Supreme Court of Kansas was clearly wrong in the determination of a Federal question arising under the Federal Employers' Liability Act. Its judgment should be reversed.

Respectfully submitted,

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APPENDIX A.

FEDERAL EMPLOYERS' LIABILITY ACT.

(Ch. 149, 35 Stat. 65.)

"Section 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2. (Same as Section 1, except that it applies to the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States.)

Section 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in

any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 4. In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: Provided, That in any action brought against any such carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Section 6. No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Under this Act an action may be brought in a (Circuit court) of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. (1910 Amendment, Ch. 143, 36 Stat. 291.)

Section 7. The term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Section 8. Nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees', approved June eleventh, nineteen hundred and six.

Section 9. Any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." (1910 Amendment, Ch. 143, 36 Stat. 291.)

APPENDIX B.

KANSAS EMPLOYERS' LIABILITY ACT OF 1911.

(Sec. 66-237 to 66-241, R. S. 1923.)

66-237. Scope of liability for injuries or death. That every company, corporation, receiver or other person operating any railroad in this state shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad or in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow and children, or husband and children, or children or mother

or father of the deceased, and if none, then the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason or any insufficiency of clearance of obstructions, of strength of roadbed and tracks or structure, of machinery and equipment, of lights and signals, or rules and regulations and of number of employees to perform the particular duties with safety to themselves and their coemployees, or of any other insufficiency, or by reason of any defect, which defect is due to the negligence of said employer, its officers, agents, servants or other employees in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves, or other equipment.

66-238. Contributory negligence. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officers, agents, servants or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee.

66-239. Assumption of risk. That in any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation of such common carrier, its officers, agents, servants, or other employees of any federal or state statute enacted

for the safety of employees contributed to the injury or death of such employee.

66-240. Limitation of liability; set-off. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

66-241. Survival of right of action. That any right of action given by this act to a person suffering injury shall survive to his or her personal representatives, for the benefit of those entitled to recover under this act, but in such cases there shall be only one recovery for the same injury.

APPENDIX C.

KANSAS LORD CAMPBELL'S ACT STATUTE

(Section 422, Ch. 80, G. S., 1868; re-enacted as Sec. 419, Ch. 182, Laws 1909; Sec. 60-3203, R. S. 1923.)

60-3203. Action for wrongful death. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

(13)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. [redacted] 131

ANDREW W. MELLON (SUBSTITUTED FOR JAMES C. DAVIS) DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, *Petitioner*,

vs.

EDWARD GOODYEAR (SUBSTITUTED FOR LOUISA GOODYEAR), AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 662.

ANDREW W. MELLON (SUBSTITUTED FOR JAMES C. DAVIS) DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, *Petitioner*,

vs.

EDWARD GOODYEAR (SUBSTITUTED FOR LOUISA GOODYEAR), AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Without attempting to brief the correctness of the decision of the state court, this respondent desires only to call attention to what has been decided in the

case, so that this Court may pass upon the petition for a writ of certiorari.

The judgment sought to be reviewed appears on p. 129 of the record and is reported in 121 Kan. 392, 247 Pac. Rep. 446. This decision merely refers to the previous decision of the same court in the same case, upon the so-called Federal question, hence, resort must be had to the earlier decision to ascertain what the Supreme Court of Kansas decided, and whether it was necessary in determination of the cause. The first decision is reported in 114 Kan. 557, 220 Pac. 282. The conclusion of the opinion in this case would seem to remove any Federal question and is in the following words:

> "Though not taken into consideration in the conclusion reached, there are two matters which are, perhaps, worthy of note. First, the release signed by Lewis Goodyear did not purport on its face to release anything but *his* claim for damages to *him*. The only mention in the release of damages for death is in a clause printed in parenthesis reading, '(or of resulting death, if this be executed by an administrator or administratrix of the estate of said person.)' It was not, of course, signed by an administrator or executor, hence this clause is not effective. Second, the evidence clearly shows that the payment made Lewis Goodyear by the defendant was computed upon the basis of time he had lost, being straight time, possibly plus one or two items of expense, from the date of the injury to March 1, 1920. Nothing was paid him for pain and suffering, for which he might have recovered in an action brought by him. This fact would not, of course, invalidate the release so far as he was concerned, as he was at liberty to settle his claim for a sum less than the total amount due him if he wished to do so.

> Thus it seems clear that in this case nothing was paid in settlement of the right of action for the death, and that the release relied upon does not purport to settle such right of action."

ARGUMENT.

Even though there may be a Federal question incidentally involved, because of a construction of a Federal statute, yet the holding of the Supreme Court of Kansas is merely that the release, even though valid, does not constitute a defense to the damages recovered by the administratrix. Stating the matter again, since the Supreme Court of Kansas found that the release did not attempt to release anything but the claim of damages arising to the deceased, and not the damages arising to the administratrix, and furthermore, since the Supreme Court of Kansas found that the only damages that were sought to be liquidated by the consideration paid the deceased was for his loss of time, and no attempt was made to settle the cause of action arising on account of his death, we have a State Court merely construing a contract. We, also, have the State Court determining, from the facts, that the release complained of did not release the cause of action, on the part of the administratrix, for the damages arising by reason of the death of Lewis Goodyear. Thus, it would seem that there was no Federal question, but rather a construction of a contract by a State Court, and which is not a Federal question.

Even though a Federal question is involved, yet the construction of the release in controversy (R. 13) shows that there was no attempt to release the cause of action arising by reason of the death of Lewis Goodyear; and, since this court has repeatedly held

that there are two causes of action in cases of this character, one arising to the injured party for his personal injuries during his life time, and one arising in his dependants at his death, certainly the release, in order to bar the second cause of action, must be comprehensive enough for that purpose. So, for the two reasons stated by the Supreme Court of Kansas, in the portion of the opinion quoted above, there is no need for this court to assume jurisdiction of this cause, in order to determine whether or not a release by the injured party might be made which would cover the cause of action arising at his death, for, in the instant case the release does not attempt so to do. Supposing the release expressly recited that it should not cover the damages arising to the dependants, in case Mr. Goodyear died as a result of his injuries, but that the release was only in satisfaction of his claims for loss of wages and his personal damages, then, there would be no need to construe the Federal Employers Liability Act as to whether or not a release might not be made of the cause of action arising at the death of the injured party. We have, in fact, the situation exactly as assumed, because the release in controversy does not attempt to discharge the damages arising to the dependants of Lewis Goodyear, in case he died as a result of the injuries received.

The verdict for the plaintiff in this case is a finding that Lewis Goodyear died as a result of the injuries received; the special findings of the jury are that the release did not result from fraud, mental incapacity or mutual mistake; but there are no findings that Lewis Goodyear did not die as a result of his injuries received, because of the negligence of the petitioner; nor, are there any special findings that will in

any wise over turn the general verdict for damages. Nor, is there any complaint that the trial court did not correctly try the case as to the liability for these damages; nor, is there any complaint that the evidence does not support the award of damages, based upon the negligence of the petitioner. The only question raised, by the petitioner, is that the release covers the cause of action, arising at the death of Lewis Goodyear, in favor of his dependants. The Kansas Supreme Court, in construing the Federal Employers Liability Act, holds that the injured party can not ever release this second cause of action arising at his death; but, such a decision by the Kansas Supreme Court was unnecessary in the instant case, for the reason that the release does not attempt to release this second cause of action, arising at the death of Lewis Goodyear. Therefore, it is unnecessary to go into the construction of the Federal Employers Liability Act in respect to the right of the injured party to bar the second cause of action, by a good and sufficient release executed by him, which covers the second cause of action.

It would seem that the situation is somewhat similar to the one involved in the case of New Orleans and N. E. R. R. Co., vs. Nat'l. Rice M. Co., 234 U. S. 80, 34 Sup. Ct. Rep. 726, in which case this Court held that the decision was on a non-federal question, under the following facts. There was an interstate shipment of rice that was burned because of extraordinary floods, which burning might have been prevented, except for the negligence of the agents of the carriers. The effect of the decision is that even though the construction of the law was as contended by the carriers, still there was a liability because the "carriers negligently permitted the cars containing the rice to remain within the in-

fluence of the rising flood and in immediate proximity to the quick lime, when ordinary prudence required their removal to a place of safety." (Syl.) The opinion quotes from the decision of the Supreme Court of Louisiana to the effect that the evidence showed negligence for which a recovery should be had, and this court held:

> "As it clearly appears that the judgment rested upon a ground which was not only adequate to sustain it, but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right in the sense contemplated by p. 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227). Whether the right was well founded we therefore need not consider."

When this case was finally determined by the Supreme Court of Kansas in 121 Kan. 392, the Court again recognized the fact that the release in controversy did not attempt to deal with the cause of action arising at the death of the deceased; and the following portion of the first decision by the Supreme Court in the case was quoted as being the opinion of the Court in the second decision (R. 31):

> "'The federal employers' liability act (35 U. S. Stat. ch. 149, as amended by 36 U. S. Stat. ch. 143) creates a right of action in the injured employee for his suffering and loss (fol. 135) resulting from the injury and also creates a distinct and independent right of action in the personal representative of the deceased employee in the event death results from the injury, for the benefit of certain designated dependents.
>
> 'A settlement made by the injured employee after the injury and prior to this death, for his

> suffering and loss, is not a bar to the action by the personal representative for the benefit of dependents for the death, if it resulted from the injury.' "

If this Honorable Court had never determined that there were the two causes of action, as pointed out by the Supreme Court of Kansas, then it might be urged that there was a Federal question before this Court which needed consideration; but this Court has at all times, when the matter has been presented held that the Federal Employers' Liability Act created two causes of action. The case of St. Louis I. M. and S. Ry. Co. vs. Craft, 237 U. S. 648, 35 Sup. Ct. Rep. 704 at p. 706, held:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to the personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but is a single recovery for a double wrong."

See, also, Mich. Central Ry. Co. vs. Vreeland, 227 U. S. 59, and Chesapeake and Ohio R. R. Co. vs. Kelly, 241 U. S. 485, and Great Northern R. R. Co. vs. Capital Trust Co., 242 U. S. 144.

There can be no doubt but that this Court had determined that there are such two causes of action, and that one starts where the other ends, and that the damages do not overlap; and that the injured party has a claim for his personal damages up until his death;

and that if he dies a new cause of action then arises for loss of support after his death, and which damages begin where the damages to the injured one ends. In the case at hand, the Supreme Court of Kansas followed the decisions of this Honorable Court and held that the release in controversy applied only to the personal damages arising to Lewis Goodyear. An examination of this release will show to this Court that such is the fact, and it would be useless for this Court to assume jurisdiction in order to determine whether or not a release might not be so formulated as would be sufficient to release the second cause of action, as well as the first, for the simple reason that we have no such release under consideration in this case.

Even though the Supreme Court of Kansas went further than necessary and construed the Federal Employers' Liability Act as meaning, that a release never could be formulated and executed by the injured man before his death, that would bind his dependants as to the cause of action arising to them at his death, this Court has repeatedly held that the decision of a State Court must be upon a question that is real and substantial, and that such decision was necessary to a determination of the cause. See Cleveland R. R. Co. vs. Cleveland, 35 Sup. Ct. 21; also, 25 C. J. 928 which says: "In order that a decision of the State Court may be subject to review by the federal Supreme Court on the ground that a federal question is involved, it is necessary that such question should be real and substantial, and that a decision thereof should be essential to a disposition of the issues presented in the case."

The rules of this Court authorize a review, on writ of certiorari, of decisions of State Courts (Rule 35, 5a): "Where a State Court has decided a Federal question

of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court."

In view of the previous decisions of this Court construing the Federal Employers' Liability Act as having two causes of action, and that one begins where the other ends; and in view of the unquestioned construction of the release in controversy, that it did not pretend to release the second cause of action, there can be no Federal question involved that would justify this Court to take jurisdiction, even though the Kansas Supreme Court may have actually placed a new construction upon the federal statutes, to the effect that the injured party may never release, by an appropriate instrument, the second cause of action.

NO FEDERAL QUESTION IS INVOLVED.

The two grounds upon which jurisdiction is asked are; first, that there was a construction of the Federal Employers' Liability Act adverse to the contentions of petitioner which justify this court to determine the correctness thereof; second; that the decision amounts to impairment of a contract. There is no claim that the decision assails the validity of any federal statute or even the validity of the contract, as between the parties. Both points are to the effect that the construction of the contract was incorrect. The contention of the respondent is that a construction of a contract does not raise a Federal question, but even if it does, the contract speaks for itself and an examination thereof, will show that there was no release of the second cause of action, for which recovery was had in this case.

Should this court assume to determine whether or

not an injured man may release the second cause of action, and which accrues at his death, it is the contention of the respondent that the Supreme Court of Kansas correctly decided that question, and that such was decided in line with the previous decisions of this Court.

Without going into a discussion of the decisions as to whether or not there was an impairment of the contract by the State Court, such as to give this Court jurisdiction, it seems only necessary to set forth the gist thereof, as given in 25 C. J. 935 and 936:

> "The Supreme Court has jurisdiction to review a decision of a state court, where the question whether the obligation of a contract was impaired by a state law was involved therein, unless the claim of impairment is frivolous, unsubstantial, or contrary to the law as established by prior decisions of the Supreme Court. The fact that a decision of a state court may impair or fail to give effect to a contract is not a sufficient ground for review thereof by the Supreme Court."

This quotation clearly shows that there must be a state law which impairs the contract before it is a Federal question, and that it is not sufficient to have a decision of a state court which "may impair or fail to give effect to a contract." This presents the exact proposition we have in this case. The petitioner contends that the Supreme Court of Kansas failed to give effect to the release executed by Lewis Goodyear. There are many decisions of this Court cited in support of the foregoing statement in 25 C. J. 936.

None of the authorities go to the extent of holding

that where the state court construes a contract entered into in that state, that such raises a federal question, so as to give jurisdiction to the United States Supreme Court to review the construction, where such construction does not in any wise depend upon any state legislation, and does not in any wise tend to attack the validity of a law of the United States.

THE DECISION OF THE KANSAS SUPREME COURT IS CORRECT.

Even if there be a Federal question involved, we submit that the conclusions of the lower Court is in accord with the decisions of this court. No attempt will be made to refer to the various decisions of this and other courts on the power of an injured person to execute a release which will prevent the dependents recovering damages. Some of the decisions of this Court have already been pointed out in this brief. An exhaustive discussion of the subject appears in Vol. XXIII. No. 2, of the December, 1924, number of the "Michigan Law Review," by Bowen E. Schumacher of the Chicago, Illinois Bar, beginning on page 114 and ending on page 137. He points out at common law there is no survival of a cause of action for a tort, or the right of action to the dependents for damages resulting to them from the death occasioned by the wrong of another. That the Lord Campbell's Act has been followed in the United States, and this creates a right of action at the death of the injured party; whereas, The Survival Acts prevent the abating of the causes of action already accrued to the deceased before his death. The author points out that the principles applying these two separate statutes have become confused. Also, that:

"The courts are practically unanimous in holding that there are really two rights in existence after the death of the injured person, and by the great weight of authority there are two rights of action which can both be prosecuted in the same suit. Whether in a state which allows the suits to be brought successively or in one which holds that a recovery in one is a bar to the other, it is universal law, that if they be prosecuted in the same suit there can be a recovery for both.—If it be admitted that there are two causes of action, it would seem absurd to hold that where the decedent's right is barred by the statute of limitations, the right of the administrator is also barred because the deceased if alive could not have an action. The proper holding in such a case would be to look at the death as the time when the cause of action first accrued in favor of the administrator under Lord Campbell's Act and to allow him to recover whether or not the action of the injured person is barred. If, as the authorities seem to hold as seen above, the cause of action under Lord Campbell's Act does not arise until death, the statute of limitations should not start running until that event." (pp. 124-5)

The author of this article also points out that the confusion that has crept into the decisions of the State Courts has been as a result of the fear of excessive verdicts (p. 125), and to avoid double recoveries. (p. 128.)

The article ends with a discussion of the Federal Employers' Liability Act, and the decisions construing the same. The case of Mich. Central Ry. Co. vs. Vreeland, 227 U. S. 59, 33 Sup. Ct. Rep. 192 is referred to as having determined that "the act declares two distinct and independent liabilities resting of course on the same common foundation of a wrongful injury but

based on altogether different principles." (p. 132.) And that:

> "'The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of his death * * * This cause of action is independent of any cause of action which the decedent had and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon entirely different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only." (quotation from Mich. Ry. vs. Vreeland, *supra.*)

The author of the article then says that the Federal Employers Liability Act contains "no provision similar to that in Lord Campbell's Act that could be construed to mean that the employee must have had an action before or at the time of his death." (p. 133) Next is discussed the survival amendment to this act by which "the original statute was amended by a provision that the right of action given for personal injury should survive to his personal representative for the benefit of the named beneficiaries with the additional proviso that there should only be one recovery for the same injury." (p. 133) This amendment really provides for the survivor of the first cause of action under this act, the original act providing only for the cause of action arising to the dependents. The author then discusses the case of St. Louis, Iron Mountain and So. Ry. Co. vs. Craft, 237 U. S. 648,

which recognizes "two distinct rights of action, one in the injured person—and the other in his personal representative for the injuries sustained by designated relatives where the injuries immediately or ultimately result in death," which decision, also, is quoted as follows:

> "The conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect *the two claims are quite distinct no part of one being embraced in the other* * * * One begins where the other ends and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

The author follows the preceding quotation with this discussion:

> "The construction put upon the 'one recovery' clause was that only one action should be brought for the two items of damage, the intent of the legislature being, not to take away a right, but to reduce litigation on the single set of facts. That both rights can be set up in the one action is the unanimous holding of all the courts, both state and federal.
>
> There is a distinct difference between the damages recoverable in the two actions given under the federal statute. In the action for the damage to the injured employee due to the injury the 'damages recoverable * * * are limited to such as will reasonably compensate for the loss and suffering of the injured person while he lived.' The dam-

ages given by the original act in the action for the death itself are strictly confined to the pecuniary damage for loss of support or contribution, there being no allowance for injured feelings, loss of society or any damage suffered by decedent." (pp. 134 and 135.)

The article ends with a discussion under the head "The Trend of Supreme Court Decisions," (p. 135) which is so closely in point with the question raised by the petitioner in this cause, that we have taken the liberty of setting it out in full.

"The situation as seen above is this: The Supreme Court has unequivocally held that the statute creates two separate and distinct causes of action which can be sued on jointly. It has held that the measure of damages on each right of action is separate and distinct. In a case more recent than either the *Vreeland case* or the *Craft* case it has stated that 'the question of the proper measure of damages is inseparably connected with the right of action.' 53 In the *Craft* case it intimated that but one action should be allowed under the terms of the statute. And in the *Vreeland* case in disussing the state Lord Campbell's Acts the court said, 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has generally been held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death, to have maintained an action for his wrongful injury.' And elsewhere in the opinion the statement is made that the federal act is 'essentially identical with Lord Campbell's Act.' Obviously this latter statement is erroneous, for here there is no condition express or implied in the statute that there must have been a right in decedent to have sued immediately before his death.

The two statutes are essentially different and one of the principal reasons given by the state courts in refusing relief after death is not present under the federal act.

We have here no danger of the damages in one suit or settlement overlapping those in another, we have little danger of a sympathetic jury allowing excessive damages in either suit, we have an express statement that there are two causes and two rights of action, and it is clear that the suit for the death is not conditional upon there being a right of action in decedent. The only basis upon which a decision could be rested allowing only one suit would be in the words of the statute, *viz.*, 'But in such cases there shall be but one recovery for the same injury.' The Supreme Court could, it is submitted, hold with perfect logic that a recovery on one right would not bar a suit on another, by interpreting the words of the statute to allow but one recovery for each injury, there being two separate and distinct injuries to two separate and distinct rights.

Release Should Not Bar.—However, even if the Supreme Court should * * * hold that a suit on one right, before or after death, barred a suit on the other, it could still with logic hold that a release or accord and satisfaction of one claim would not bar a suit on the other. For the basis of refusal of relief where there are two suits brought would be in the words of the statute, that but one action shall be brought, and this obviously does not apply to the case where there has been a release or accord and satisfaction. This has been recognized in a recent case in one of the state courts under the federal act.

In *Goodyear v. Davis*, 220 Pac. (Kan. 1923) 282, the question was presented to the court whether or not a release executed by the deceased subsequent to his injury and prior to his death should be a bar to an action by the administratrix for

the benefit of the widow. The court reviewed the authorities English and American under the state statutes, and those under the federal act and held that such a release was not a bar to the present action. It is submitted that the result reached is entirely sound. If it be supposed that the action came up prior to the amendment which provided that the right of action of the deceased should survive, it seems clear that a release by deceased of a claim which was to die with him, and which was entirely distinct from that given to the administratrix for his death, would be no bar to the latter. The fact that the personal action has been made to survive should not change this. Congress could not have intended by an amendment as broad as the survival proviso that a right, previously given, should be cut off by settlement of a distinct claim.

The *dictum* that there are two rights of action but only one suit can be brought, should not be carried to the extent of a holding that a release of one right of action bars a suit on another. * * * The result reached by the Kansas court is sound in principle and authority."

Chesapeake and Ohio Ry. Co. v. Kelly, 241 U. S. 485, 1917 F. 367.

Respectfully submitted,

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